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04-480

IN THE

Supreme Court of the United States

METRO-GOLDWYN-MAYER STUDIOS INC., ET AL.,

Petitioners,

—v.—

GROKSTER, LTD., ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF SAN DIEGO AND IMPERIAL COUNTIES, THE AMERICAN LIBRARY ASSOCIATION, THE ASSOCIATION OF RESEARCH LIBRARIES, THE AMERICAN ASSOCIATION OF LAW LIBRARIES, THE MEDICAL LIBRARY ASSOCIATION, THE SPECIAL LIBRARIES ASSOCIATION, THE INTERNET ARCHIVE, AND PROJECT GUTENBERG AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI*[1]

The American Civil Liberties Union, the American Civil Liberties Union of Northern California, the American Civil Liberties Union Foundation of San Diego and Imperial Counties, the American Library Association, the Association of Research Libraries, the American Association of Law Libraries, the Medical Library Association, the Special Libraries Association, the Internet Archive and Project Gutenberg submit this brief urging the Court to affirm the decision below and to adopt an interpretation of the copyright infringement laws that will promote free speech and innovation on the Internet while protecting legitimate copyright interests.

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with over 400,000 members dedicated to the principles of liberty and equality embodied in the U.S. Constitution. The ACLU of Northern California and the ACLU of San Diego and Imperial Counties are two of its regional affiliates. Freedom of speech has been a central concern of the ACLU since the organization's founding in 1920, and over the last eight decades the ACLU has repeatedly considered the application of free speech principles to new communications media. Most recently and most relevantly, the ACLU has been involved in numerous state and federal cases involving freedom of expression on the Internet. Although this case was pled as purely a copyright case, its resolution has obvious implications for the development of free speech on the Internet.

The American Library Association ("ALA") is a nonprofit educational organization of approximately 65,000 librarians, library educators, information specialists, library trustees, and friends of libraries representing public, school, academic, state, and specialized libraries. ALA is dedicated to the improvement of library and information services and the public's right to a free and open information society.

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[1] The parties' letters of consent to the filing of this brief have been lodged with the Clerk. Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than *amici*, their members, or their counsel has made a monetary contribution to the preparation or submission of this brief.

The Association of Research Libraries ("ARL") is a nonprofit association of 123 research libraries in North America. ARL's members include university libraries, public libraries, government and national libraries. ARL's mission is to influence the changing environment of scholarly communication and the public policies that affect research libraries and the communities they serve. ARL pursues this mission by advancing the goals of its member research libraries, providing leadership in public and information policy to the scholarly and higher education communities, fostering the exchange of ideas and expertise, and shaping a future environment that leverages its interests with those of allied organizations.

The American Association of Law Libraries ("AALL") is a nonprofit educational organization with over 5,000 members nationwide. AALL's mission is to promote and enhance the value of law libraries to the legal and public communities, to foster the profession of law librarianship, and to provide leadership in the field of legal information and information policy.

The Medical Library Association ("MLA") is a nonprofit educational organization of more than 900 institutions and 3,800 individual members in the health sciences information field committed to educating health information professionals, supporting health information research, promoting access to the world's health sciences information, and working to ensure that the best health information is available to all.

The Special Libraries Association ("SLA") is a nonprofit, educational organization serving more than 13,000 members of the information profession, including special librarians, information managers, brokers, and consultants.

Collectively, the library *amici* listed above are engaged in preserving cultural heritage, providing educational materials, sponsoring research, digitizing materials, teaching our nation's youth, lending books, creating works, and facilitating better technologically-adapted schools. Because the library associations continuously face copyright issues, they support balanced copyright laws and balanced implementation of those laws. Restrictive copyright laws and court decisions adversely affect authors, artists, curators, archivists, historians, librarians, and readers – the creators, recorders, keepers, disseminators, and users of our culture.

The Internet Archive is a 501(c)(3) public nonprofit entity that was founded to build an "Internet library" with the purpose of offering permanent access for researchers, historians, and scholars to historical collections, and ensuring that these collections are publicly available through the Internet. The Internet Archive also encourages others to create derivative works from this material. Currently, the Internet Archive assumes all costs associated with storing this information and with providing the bandwidth to accommodate visitor traffic. Although text-based materials are relatively easy to store and distribute, the amount of audio and video material available through the Internet Archive continues to grow exponentially. Due to the tremendous volume of material in its collection and the strain placed on its bandwidth by the downloading of large audio and video files, the Internet Archive will soon find it difficult to afford web-based publishing. As a result, the Internet Archive is now actively distributing its content through peer-to-peer file-sharing networks, which allow the Internet Archive to disperse the burdens and costs of maintaining its materials among network users. Accordingly, the ability of the Internet Archive to achieve its mission will be drastically affected by any decision that limits or threatens the viability of software enabling peer-to-peer communications.

Project Gutenberg was founded by Michael S. Hart in 1971, and is the oldest all-electronic information provider on the Internet. The aim of Project Gutenberg is to make information, books and other materials available free of charge to the public in a form that the vast majority of computers, programs and people can easily read, use, quote, search and further disseminate. Project Gutenberg coordinates the efforts of thousands of volunteers worldwide to enter public domain works into computers and format them as simple electronic books ("eBooks") so that they can be used by the widest variety of computers possible, including pocket-sized devices such as Personal Digital Assistants and mobile phones. Since its inception, Project Gutenberg has made over 15,000 eBooks available. The vast majority of these eBooks are works in the public domain, including the works of Shakespeare and Plato, the King James Bible and the Koran. This figure includes over 12,000 MP3 files, most of which are individual chapters from eBooks with computer-generated text-to-speech audio performances. Project Gutenberg's collection also

includes hundreds of copyrighted works whose authors have given the Project permission to distribute their works. Project Gutenberg believes that any technology that makes it easier and cheaper for individuals to redistribute eBooks over the Internet helps achieve Project Gutenberg's goal of making information freely available to the general public. As a result, many of the files in Project Gutenberg's collection have been made available on Grokster and similar peer-to-peer networks.

STATEMENT OF THE CASE

Petitioners, the record and movie industry as well as individual songwriters, create and produce records and movies. Those works enrich and enlighten us. The copyright protection provided to those works not only ensures an adequate profit for the creators and producers, but by doing so beneficially increases the speech available to everyone.

Petitioners' movies and recordings are now largely available in digital form. Generally speaking, this means CDs for music and DVDs for movies. Although it has always been possible to duplicate most copyrighted materials, and each new developing technology has been described as posing a fatal threat to copyright protection (including the copying machine and the videocassette recorder), petitioners contend that the unique ability to make non-degradable copies of digital works, combined with the Internet's ability to distribute digital files rapidly and broadly, presents particular problems for copyright holders.

Petitioners presented these concerns to Congress, and Congress responded by enacting the Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat 2827 (1998), which extends the term of copyrights, and the Digital Millennium Copyright Act ("DMCA"), Pub. L. No. 105-304, 112 Stat 2860 (1998), which provides additional protections to copyright holders.[2]

Subsequent to passage of the DMCA, petitioners have sued thousands of people who they claimed were illegally exchanging copies of copyrighted materials. *See* Jefferson

[2] Digitization of records and movies makes it possible for copyright holders to place technical protection measures in their works that preclude copying. The DMCA made it illegal to circumvent those measures. 17 U.S.C. §1201.

Graham, *Net Music Piracy Goes To High Court*, USA Today, Jan. 24, 2005, at B2. Those lawsuits have apparently been successful at accomplishing their goal of educating the public that copyright infringement is not permitted and will be severely punished. *Id.*

Petitioners have also sued a variety of services that provided software that allowed users to share copies of digital files, including, but not limited to, copyrighted music or movie files. Petitioners contended, just as they had previously argued when the videocassette recorder came into existence, that any device or any software that can readily be used to infringe copyright is virtually always illegal under the doctrines of contributory and/or vicarious infringement unless it is built to include restrictions dictated by petitioners.

Respondents Grokster and Streamcast (hereinafter "Grokster") offer software that allows users to share copies of digital files. Some people who use that software exchange music files that are copyrighted, including files copyrighted by petitioners. Some people use the software to exchange files that are not copyrighted. Grokster unquestionably knows about both uses, and profits from both uses. Petitioners sued Grokster asserting (as they continue to assert in this Court) that these facts alone are sufficient to establish liability and to require that either Grokster be shut down or that its creators be forced to redesign their product and serve as surrogate copyright enforcers in accordance with the specifications of petitioners.

Petitioners' claims were rejected by both the district court and the Court of Appeals. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029 (C.D. Cal. 2003), *aff'd* 380 F.3d 1154 (9th Cir. 2004). Relying on *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), those courts concluded – correctly in our view – that copyright law cannot be interpreted to require that the development of a new medium of communication (hardware or software) be prohibited simply because it is capable of misuse.

SUMMARY OF ARGUMENT

One of the district court's factual findings is critical to *amici's* view of this case. "[I]t is undisputed that there are substantial noninfringing uses for Defendants' software.... "

Grokster, 259 F. Supp. 2d at 1035. This finding is fully supported by the record and corroborated by the numerous, noninfringing uses of peer-to-peer technologies. Petitioners and some of their *amici* attempt to trivialize the evidence of actual noninfringing uses. They also ignore the clear benefits of peer-to-peer technologies for distributing large files of public domain materials, government documents and copyrighted works for which authorization has been granted. *Amici* submit this brief to provide the Court with several examples of noninfringing uses, and to explain why peer-to-peer technologies are critical for these uses.

Given the abundance of noninfringing uses, *amici* believe that (1) Grokster's liability cannot turn on an analysis of the percentage of current use that constitutes direct infringement; (2) software developers should not be required to modify their software to facilitate enforcement of copyright by petitioners; and (3) free speech and the public interest would best be served by rules that allow new and innovative mediums of communication to develop and flourish.

The First Amendment embodies "'[o]ur profound national commitment to the free exchange of ideas.'" *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002) (citation omitted). This Court's decision in *Sony* reflected a similar commitment when it held that traditional notions of secondary liability for copyright infringement should not be used to deny law-abiding individuals access to valuable tools for sharing information and ideas simply because others may use those tools for improper purposes. Despite a changing technological environment, the same principle applies with equal force here. Accordingly, *amici* urge this Court to reaffirm the validity of its holding in *Sony*, and to ensure that copyright law is not allowed to unduly impede the substantial, noninfringing uses of powerful new technologies on the Internet.

ARGUMENT

I. Peer-to-Peer File-Sharing Technology Has Substantial Noninfringing Uses.

Grokster's software facilitates the peer-to-peer exchange of files over the Internet. In the more familiar case of a web site, information is created or compiled by the web site operator and

every user of the web site downloads the information from the same source. In peer-to-peer systems, information resides on the various computers of each user and is transmitted directly from one user's computer to another's. Peer-to-peer networks thus permit users to communicate with each other by distributing, sharing and downloading audio, video and text-based files without any system of centralized control.

Based on the evidence before it, the district court found it undisputed that "there are substantial noninfringing uses for Defendants' software." *Grokster*, 259 F. Supp. 2d at 1035. The court identified a number of those uses: "e.g., distributing movie trailers, free songs or other non-copyrighted works; using the software in countries where it is legal; or sharing the works of Shakespeare." *Id.* The court found that respondents had presented specific evidence of these noninfringing uses: "StreamCast has adduced evidence that the Morpheus program *is regularly used* to facilitate and search for public domain materials, government documents, media content for which distribution is authorized, media content as to which the rights owners do not object to distribution, and computer software for which distribution is permitted." *Id.* (emphasis added). After reviewing the record, the Court of Appeals agreed, holding that "from the evidence presented, the district court correctly concluded that the software was capable of substantial noninfringing uses." *Grokster*, 380 F.3d at 1161.

The examples cited by the district court are all forms of speech legitimately made, distributed and shared over peer-to-peer networks. The cited examples are not the only examples of how peer-to-peer technology is used for noninfringing, speech-enhancing purposes. *Amici* include Internet-based libraries and libraries that provide traditional and network-based services. *Amici* seek to maximize literacy, education, and entertainment through the distribution of information to the public. Peer-to-peer systems such as Grokster's can be of critical assistance in achieving this goal. For example, Project Gutenberg makes available electronic copies of books that are either in the public domain or whose authors have given their consent. There are currently over 15,000 eBooks available through Project

Gutenberg.[3] Project Gutenberg's goal is to continue to double the number of titles in its collection every 18 months, as it has done since 1991; if successful, by 2013, over one million titles will be part of the collection and available to the public. Music is also available via Project Gutenberg, including over 100 public domain recordings digitized from Edison wax cylinders and numerous contemporary copyrighted performances donated by various artists. Most of Project Gutenberg's files are presently made available on Grokster and Morpheus and other similar peer-to-peer networks such as Limewire, eDonkey/eMule, and KaZaA.

Peer-to-peer networks also play an integral role in the Internet Archive's efforts. The Internet Archive is an attempt to create an "Internet library" to offer permanent digital access to historical collections, many of which are no longer available through traditional publishers. The amount of material available through the Internet Archive is enormous. The Internet Archive currently hosts about 60,000 books, music, software and video items. Approximately one terabyte of data is downloaded from the Internet Archive each day. This is the equivalent of 200,000 MP3 songs being downloaded each day. Much of the Internet Archive is text-based material, but both the number and percentage of audio and video files are increasing rapidly, as are downloads of such files. For example, over 1,900 important public domain films from the Prelinger Archives, which physically reside at the Library of Congress, have been digitized and made available through the Internet Archive. Since being made available, these films have been downloaded over two million times; as one example, the famous U.S. Federal Civil Defense Administration's film, *Duck and Cover*, in which a cartoon turtle

[3] Project Gutenberg's collection includes, among other works: the King James Bible (New and Old Testament); all major works of William Shakespeare; *The Odyssey* by Homer; *Moby Dick* by Herman Melville; *Ulysses* by James Joyce; *The Scarlet Letter* by Nathaniel Hawthorne; *Grimm's Fairy Tales* by Jacob and Wilhelm Grimm; *The Adventures of Sherlock Holmes* by Sir Arthur Conan Doyle; *Roget's Thesaurus* by Peter Mark Roget; *Don Quixote* by Miguel de Cervantes Saavedra; *The Prince* by Niccolo Machiavelli; *The Adventures of Huckleberry Finn* by Mark Twain; *On the Origin of Species* by Charles Darwin; *The Art of War* by Sun Tzu; and *An Inquiry into the Nature and Causes of the Wealth of Nations* by Adam Smith. A complete list of the current collection can be found at the Project Gutenberg Internet site, located at http://gutenberg.org/dirs/GUTINDEX.ALL.

tells children what to do in case of an atomic attack, has been downloaded over 120,000 times. All of the text, audio and video files available through the Internet Archive are noninfringing.

For *amici*, traditional web-based distribution of material in such volumes – especially large files like audio and video files – can become tremendously expensive and, at a certain point, cost-prohibitive. That is because web-based publishing requires the host to bear both the data storage costs and the bandwidth costs associated with traffic to and from its site. Indeed, the more popular a file is – i.e., the more downloaded it is – the higher the bandwidth costs will be. *See, e.g.*, Glenn Fleishman, *Blindsided by Bandwidth Fees, Online Barkers Think Twice*, N.Y. Times, Apr. 24, 2003, at G8 (discussing bandwidth costs and potential perils of providing free download for book through website). For this reason, *amici* strongly support the use of peer-to-peer technology, which redirects user traffic away from a central web-server to various sites throughout the Internet community, eliminating the need for the content provider to bear all the bandwidth and storage costs, while facilitating the broad dissemination of information to as many people as possible.[4]

It is precisely because peer-to-peer networks reduce costs that some content providers are increasingly relying on them to distribute their products. *See, e.g.*, James Pearce, *Lindows Offers Software For Free Over P2P*, CNET News.com, Jan. 30, 2004, *available at* http://news.com.com/Lindows+offers+software+for+free+over+P2P/2100-7344_3-5150931.html?tag=st.rn (last visited February 24, 2005) (discussing how a company is lowering costs and seeking to attract new customers by distributing its Linux-based operating system software over peer-to-peer networks). The cost savings are, in turn, passed on to the consumer; indeed, because the distribution costs are so much lower, some companies are offering their products for free via peer-to-peer networks. *Id.*

Even musicians and artists, some of whom argue that they have been most affected by the improper uses of peer-to-peer networks, have turned to peer-to-peer technology as a cost-effective mechanism to gain wider distribution of their works. For

[4] The BBC is similarly relying on peer-to-peer filesharing to make its historical archives open and accessible to the public. *See* Lucy Sherriff, *BBC Ponders P2P Distribution*, The Register, Feb. 17, 2004, *available at* http://www.theregister.co.uk/2004/02/17/bbc_ponders_p2p_distribution (last visited February 24, 2005).

example, up-and-coming musicians who do not have a large record label promoting their work rely on peer-to-peer technology to create a "buzz" among listeners. *See* Chris Nelson, *Upstart Labels See File Sharing as Ally, Not Foe*, N.Y. Times, Sept. 22, 2003, at C1. Likewise, many authors have given Project Gutenberg permission to distribute their works in the hopes of reaching a broader audience.

Established artists are also using peer-to-peer technology for commercial purposes. *See* Katie Dean, *Winwood: Roll With P2P, Baby*, Wired Magazine, July 9, 2004, *available at* http://www.wired.com/news/digiwood/0,1412,64128,00.html (last visited Feb. 25, 2005) (discussing how Steve Winwood's release of one track on peer-to-peer networks caused sales of his album to increase up to eight times in some regions). Some well-known musicians even encourage their fans to share recordings of live shows on peer-to-peer networks to spur attendance at concerts, which are their main source of income (as opposed to royalties). *See* Neil Strauss, *File-Sharing Battle Leaves Musicians Caught in Middle*, N.Y. Times, Sept. 14, 2003, at A1. The Internet Archive provides access to authorized recordings of over 20,000 live performances by more than 850 artists such as Hank Williams III, Maroon5, the Grateful Dead, and Vanessa Carlton, and to studio recordings by artists such as Benny Goodman, Duke Ellington, and Cab Calloway.[5]

Indeed, news reports have revealed that petitioners themselves use programs like Grokster as a kind of Nielson rating system, tracking the popularity of downloaded works and using that information to guide their decisions about which bands to sign and which CDs to promote. *BigChampagne Is Watching You*, Wired Magazine, Issue 11.10, Oct. 2003, *available at* http://www.wired.com/wired/archive/11.10/fileshare.html (last

[5] Given these marketing advantages, it is not surprising that a December 2004 report based on a survey of over 2,700 artists and musicians concluded that, "Across the board, artists and musicians are more likely to say that the internet has made it possible for them to make more money from their art than they are to say it has made it harder to protect their work from piracy or unlawful use." PEW Internet and American Life Project. *Artists, Musicians and the Internet*, Dec. 5, 2004, at ii, *available at* http://www.pewinternet.org/pdfs/PIP_Artists_Musicians_Report.pdf (last visited February 24, 2005); *see also* Tom Zeller, Jr., *Pew File-Sharing Survey Gives a Voice to Artists*, N.Y. Times, Dec. 6, 2004, at E1 (discussing survey).

visited Feb. 24, 2005). Petitioners also use peer-to-peer programs to target regions of the country for promotion when a band or artist is particularly popular in that region, and to persuade radio stations in those regions to play their songs. *Id.*

Even the United States armed forces have recognized the benefits and cost efficiencies of peer-to-peer networks. "America's Army" is a free combat video game produced by the United States Army in an attempt to attract young recruits. Seth Schiesel, *On Maneuvers With The Army's Game Squad*, N.Y. Times, February 17, 2005, at G1. The video game is so popular that it is believed to be more effective at delivering the Army's messages than the millions of dollars in advertising spent by the Army. *Id.* Not surprisingly, the Army has distributed the video game on peer-to-peer networks like those at issue in this lawsuit. Aliya Sternstein, *Gnutella Wants You*, Forbes Magazine, Nov. 10, 2003, *available at* 2003 WL 66022374.[6]

Like libraries, academic institutions are also beginning to look to peer-to-peer networks to further their educational mission. For example, the Berklee College of Music has initiated a program called "Berklee Shares" to make many of the school's music lessons available to the public for free, to be downloaded, copied and shared on peer-to-peer networks. Katie Dean, *Teaching Music Traders A Lesson*, Wired News, Nov. 12, 2003, *available at* http://www.wired.com/news/digiwood/0,1412,61173,00.html?tw+wn_tophead_3 (last visited Feb. 24, 2005). In addition to providing the public with access to the resources and knowledge of the school, Berklee Shares has also benefited the school by increasing awareness of its programs and faculty and increasing revenues. Press Release, Berklee College of Music, *File Sharing Works for Berklee College of Music* (May 18, 2004), *available at* http://www.berkleeshares.com/press/pressrelease2 (last visited Feb. 24, 2005).

Peer-to-peer networks are also being utilized by individuals to express and disseminate their political views and beliefs to as many people as possible, and to provide the public

[6] The armed forces are also utilizing peer-to-peer technology on the battlefield itself. *See* Paul Rubens, *Army Tactics Are The Business*, Financial Times, Nov. 26, 2003, *available at* http://www.groove.net/pdf/armytactics.pdf (last visited Feb. 24, 2005) (discussing army's use of peer-to-peer technology and how businesses could similarly utilize the technology).

with access to a vast assortment of government information and political speech. *See* Kim Zetter, *Downloading For Democracy*, Wired News, July 19, 2004, *available at* http://www.wired.com/news/politics/0,1283,64237,00.html (last visited Feb. 24, 2005) (discussing the outragedmoderates.org website, which contains hundreds of government and court documents and makes them available for download through peer-to-peer networks). One website, p2p-politics.org, posts political commentary, including video clips of campaign ads from the candidates for the 2004 Presidency. *See* http://p2p-politics.org (last visited Feb. 24, 2005). Another includes links to numerous government documents such as the 9/11 Commission Report, all seventeen of the accompanying staff statements, and the actual testimony of many principal staff members from the Clinton and Bush administrations. *See* http://www.outragedmoderates.org/HowtoUseP2PNetworks.html (last visited Feb. 24, 2005). Although these public documents are available from other sources as well, the nature of peer-to-peer technology makes it much easier – and quicker – to access and view the documents, many of which are quite lengthy and otherwise difficult to locate. *Id.*; Zetter, *supra*.

A related development, one which will likely occur with far greater prevalence in the future, is that recordings of public hearings, such as Congressional hearings, are now being made available to the public via peer-to-peer networks. *See* P2P Congress, *P2P Site Enables Access to Video of Government Hearings*, *available at* http://www.p2pcongress.org/press.php (last visited Feb. 24, 2005). Some of these hearings, while broadcast live, are not recorded by the government; peer-to-peer technology enables interested individuals to record the hearings themselves and efficiently (and cheaply) make them available to others. Similarly, recordings of oral arguments before this Court are being digitized and made available on peer-to-peer networks. *See Download Top Supreme Court Hits!*, CBSNews.com, Aug. 6, 2003, *available at* http://www.cbsnews.com/stories/2003/08/06/tech/main567017.shtml (last visited Feb. 24, 2005). Indeed, if one wants to hear the oral argument from the *Sony* case that is at the heart of this very matter, that recording is now easily accessible. *See* The Oyez Project, *Sony Corp v. Universal City Studios*, 464 U.S. 417 (1984), *available at* http://www.oyez.org/oyez/resource/case/768/ (last visited Feb. 24, 2005).

In light of these facts, petitioners cannot seriously dispute that this technology has numerous significant noninfringing uses. Instead, as they did before the lower courts, petititioners repeatedly insist that the amount of infringing uses somehow nullifies the importance of these substantial noninfringing uses. Even crediting petitioners' claim that 90% of peer-to-peer files are infringing, however, the number of noninfringing uses is still enormous when measured in absolute terms. It is estimated that there were approximately 13 billion files available on peer-to-peer networks in 2004. *See* Graham, *supra*. Ten percent of that figure – the number of noninfringing files on peer-to-peer systems – is still 1.3 billion files. By comparison, there are only about 128 million items in the Library of Congress. *See About the Library*, *available at* http://www.loc.gov/about/ (last visited Feb. 24, 2005).[7]

Moreover, the impact of the relief that petitioners are seeking is likely to grow over time as the noninfringing uses of peer-to-peer software inevitably grow. For example, as political campaigns move online and begin to take even greater advantage of the Internet and digital technologies, it is likely that more candidates will turn to peer-to-peer technology to distribute position papers and campaign videos and to otherwise tap into the vast audience of users. *Cf.* Ryan P. Winkler, *Preserving the Potential for Politics Online: The Internet's Challenge to Federal Election Law*, 84 Minn. L. Rev. 1867, 1868-71 (2000) (noting the Internet's advantages – *i.e.*, low cost and decentralization – for political activism). Particularly in this context, the cost savings of peer-to-peer distribution make it a superior alternative to other forms of web-based political organizing, a phenomenon which itself has only started to take hold. *See id.* Although this concept may have seemed far-fetched only a few years ago, at least one candidate for the 2004 Presidency, Michael Badnarik, the Libertarian Party candidate, actually utilized peer-to-peer networks. Blodnarik: The Daily Campaign, *Grassroots Promotion – Videos of Badnarik*, June 9, 2004, *available at* http://badnarik.org/supporters/blog/2004/06/09/grassroots-

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[7] Indeed, a recent search of KaZaA, a peer-to-peer network similar to Grokster, revealed that there were over 820 million files being shared on that one network alone, meaning that there were over 82 million noninfringing files.

promotion-videos-of-badnarik/ (last visited Feb. 24, 2004). A peer-to-peer network similar to Grokster's, BearShare, was even used to help register people to vote. Press Release, BearShare, *BearShare File-Sharing Service Registers Voters Through The Your Vote Matters.org Online Voter Registration Service* (Sep. 7, 2004), *available at* http://www.bearshare.com/ press/voter.htm (last visited Feb. 24, 2005). In the coming years, as the technology becomes even more widespread, it is likely that all players in the political process – including politicians, political parties, and advocacy organizations – will increasingly find innovative ways to benefit from utilizing peer-to-peer networks.

Likewise, people living in other countries under totalitarian regimes that censor "unpatriotic" or "inappropriate" websites will increasingly be able to circumvent that censorship and access information from anywhere in the world by using peer-to-peer technology. *See New Technology May Foil PRC Attempts At Censorship Efforts*, The China Post, March 12, 2003, *available at* 2003 WL 4136640 (noting that Internet users in mainland China are unable to access information directly from websites on subjects such as Taiwan, democracy, Tibet, Falun Gong, and major news sites such as CNN and BBC); Heather Green, *The Underground Internet*, Business Week, Sep. 15, 2003, at 80 (discussing Freenet-China, a Mandarin language version of a widely used peer-to-peer network that enables users to access news and websites, such as CNN.com, that the Chinese government censors). Among the documents that have been shared on peer-to-peer networks in China are the Tiananmen Papers, which are a compilation of the transcripts from 1989 meetings among Chinese leaders in the aftermath of the student protests. *See* Jennifer Lee, *Grass-Roots War Heats Up Against Government Web Blocks*, Chicago Tribune, Oct. 14, 2002, at 4.[8] Although peer-to-peer technology may not provide a foolproof method for avoiding government censorship, it will certainly be much more difficult for totalitarian states to stifle the flow of information on peer-to-peer networks than to block a handful of centralized websites. *See* The House Policy Committee, Policy

[8] One of the peer-to-peer systems being used in China is called the "Six/Four System," which refers to the date of the Tiananmen Square massacre on June 4, 1989. *See* Jim Rapoza, *Six/Four: The Internet Under Cover*, Eweek from ZDWire, March 6, 2003, *available at* 2003 WL 5734694.

Statement, *Tear Down This Firewall*, Sep. 19, 2002, *available at* http://policy.house.gov/html/news_item.cfm?id=112 (detailing the prevalence of Internet censorship by various non-democratic regimes and recognizing that one current method for "[d]efeating the [c]ensors" is through technologies, including peer-to-peer networks, that "help keep information flowing").

Peer-to-peer technologies also offer many potential noninfringing uses for libraries. Libraries, who are one of the largest consumer groups of digital products, can use the technology for, among other things: interlibrary sharing of information such as government documents and other public domain materials; delivery of data files directly to the desktop of a researcher; support of both classroom and distance education; and meeting the learning needs of housebound or disabled users.[9] Libraries throughout the world are digitizing their collections; peer-to-peer technology will likely play a significant role in these efforts to make this vast array of information publicly available.

Predictions about the manner in which a new medium of communication will develop are notoriously unreliable. For that reason, petitioners' emphasis on how people are currently using this software is misplaced. Twenty years ago, some of these same petitioners predicted that videocassette recorders would destroy their business. As we now know, not only did companies like petitioners not suffer, they actually experienced a financial windfall due to the development of a new market created by the new technology. For similar reasons, *amici* believe that peer-to-peer technology, if permitted to develop naturally, will increasingly be used for the distribution of additional noninfringing material. As more and more people become aware of resources offered by *amici*, and become aware of the potential of peer-to-peer systems to permit evasion of state censorship schemes, the noninfringing traffic on these user networks will undoubtedly continue to grow. *Amici* urge this Court not to close off prematurely the development of a new technology that already has demonstrated such significant noninfringing uses.

[9] For example, under the LOCKSS ("Lots of Copies Keep Stuff Safe") Program, many libraries are now using peer-to-peer technology to preserve and give access to a wide variety of web-based content, such as electronic journals, which are not always kept available on the Internet. *See About LOCKSS*, *available at* http://lockss.stanford.edu/about/about.htm (last visited Feb. 25, 2005).

II. PETITIONERS' ATTEMPTS TO LIMIT THE *SONY* DEFENSE OF SUBSTANTIAL NONINFRINGING USES SHOULD BE REJECTED.

A. Secondary Liability Cannot Turn On An Analysis Of The Percentage Of Current Use That Constitutes Direct Infringement.

Notwithstanding all of these legitimate, socially beneficial and noninfringing uses, petitioners contend that Grokster should be liable because it has "materially contributed" to acts of copyright infringement "by creating, maintaining, and expanding their services, which make possible the infringement that could not otherwise occur." Brief for Motion Picture Studio and Recording Company Petitioners ("Pet. Br.") at 17-18. That is, of course, directly contrary to the holding in *Sony*. Sony created, maintained and sold a product that made infringement possible. This Court held that the ability of the product to be used for infringement did not establish liability so long as there were significant noninfringing uses as well. *Sony*, 464 U.S. at 442. The Court explained that the pivotal question was not whether the Betamax machine assisted infringement or made it possible, but whether the Betamax machine was "capable of substantial noninfringing uses." *Id.* Because the Betamax was "capable of substantial noninfringing uses," the Court ruled that Sony's sale of the product, even though it also made infringement possible, did not constitute contributory infringement. *Id.* at 456.[10]

[10] Petitioners argue that *Sony* does not apply, and that the existence of substantial noninfringing uses are irrelevant, because respondents intended to facilitate infringement. Pet. Br. at 27 ("they plainly acted with the intention of facilitating infringement. It is thus irrelevant whether their services have commercially significant noninfringing uses."). After carefully reviewing the record, however, the district court concluded that petitioners "had adduced *no evidence* that [respondents] materially facilitate or contribute to the file exchanges that form the basis of these lawsuits." J.A. 1217 (June 18, 2003 Order) (emphasis in original). Petitioners' reliance on *Kalem Co. v. Harper Brothers*, 222 U.S. 55 (1911) – the very case they relied on in connection with the *Sony* case – as support for the proposition that Grokster should be held liable is misplaced for exactly the same reasons as it was in *Sony*. *See Sony*, 464 U.S. at 436 ("Respondents argue that *Kalem* stands for the proposition that supplying the 'means' to accomplish an infringing activity and encouraging that activity through advertisement are sufficient to establish liability for copyright infringement. This argument rests on a gross generalization that cannot withstand scrutiny. The producer in *Kalem* did not merely provide the 'means' to accomplish an infringing activity; the producer supplied the work itself, albeit in a new medium of expression. Petitioners in the instant case do not supply Betamax consumers with respondents' works; respondents do.").

Recognizing that *Sony* likely proscribes their preferred proposition that noninfringing uses are irrelevant, petitioners alternatively contend that the *Sony* defense is not available "when the primary or principal use of a product or service is infringing." Pet. Br. at 31. Indeed, the thrust of much of petitioners' brief is that the amount of infringement occurring on peer-to-peer networks is so great that Grokster just must be liable – no matter how significant the noninfringing uses are. Petitioners argue, in essence, that when a technology is used primarily for infringing purposes, the noninfringing speech that also relies on the technology can be sacrificed as collateral damage.

In *Sony*, this Court found that it did not have to "give precise content to the question of how much use is commercially significant."[11] *Sony*, 464 U.S. at 442. In fact, the Court rested its decision on the fact that the technology was capable of *one* potential use that was noninfringing: time-shifting. *Id.* ("one potential use of the Betamax plainly satisfies this standard, however it is understood: private, non-commercial time-shifting in the home").[12] Despite these same petitioners' urging, the Court expressly rejected a rigid "percentages test," *see id.* at 491 (Blackmun, J., dissenting) (advocating for percentages test), opting instead for a test that focuses on a technology's capacity for noninfringing use. *Id.* at 442. Noninfringing uses need not, therefore, be the majority; they need only be substantial. *Id.*

The district court in this case found that there were currently "substantial noninfringing uses" for Grokster. *Grokster*, 259 F. Supp. 2d at 1035. Indeed, the district court found that this fact was "undisputed." *Grokster*, 259 F. Supp. 2d at 1035. The district court cited the evidence in support of that finding. *Amici*

[11] The Seventh Circuit's dicta in *In re Aimster Copyright Litigation* suggesting that courts must balance the respective magnitude of current infringing versus noninfringing uses, 334 F.3d 643, 650 (7th Cir. 2003), clearly contradicts *Sony*.

[12] The Court also acknowledged that the Betamax could be used for authorized recording, another noninfringing use. *See id.* at 443-47.

have cited additional examples above. For example, all of the books on Project Gutenberg, which include many of the greatest works of world literature, can be accessed using Grokster's software. The lower courts, accordingly, were correct to find that Grokster could not be held secondarily liable under *Sony*.

B. Petitioners' Attempts to Narrow What Constitutes A Significant Noninfringing Use Should Be Rejected.

As a further attempt to limit *Sony* and to bolster their argument that Grokster has no significant noninfringing uses, petitioners contend that future noninfringing uses, as opposed to actual current uses, are not enough to avoid liability. Pet. Br. at 35-36. This argument is also directly contradicted by *Sony*, which held that the future possibility of noninfringing uses is sufficient, on its own, to defeat liability. *Sony*, 464 U.S. at 442 ("Indeed, it need merely be capable of substantial noninfringing uses"). The district court properly held that there are likely to be additional substantial noninfringing uses in the future. *Grokster*, 259 F. Supp. 2d at 1036. *Amici* have pointed out other probable future noninfringing uses. As discussed, those noninfringing uses are likely to increase both in volume and in percentage as users become more familiar with this technology.

Just as the *Sony* test better preserves the value of noninfringing uses by eschewing a percentage-based test, so too is it more sensitive to the fact that certain uses of technology will ebb and flow over time. The first users of peer-to-peer technology undoubtedly comprised a very specific subgroup of technologically savvy computer users. As more people become familiar with it, the percentage of noninfringing use on these networks will undoubtedly increase. Just as the legitimate market for rental and sale of videos took time to develop after the Betamax was invented, so too will the noninfringing uses of peer-to-peer technology grow over time. *See, e.g.*, Jonathan Kim, *High-Tech Tension Over Illegal Uses*, Washington Post, Feb. 22, 2005, at E1 (discussing how the first users of many innovative technologies often use them for improper purposes before other users arrive and use them in lawful manners).

Petitioners – this time joined by the United States – offer one final variation on their view that the percentage of infringing versus noninfringing uses is critical to a determination of liability even under *Sony*. They assert that liability should be found unless the current noninfringing uses would be sufficient standing alone to be "commercially viable." Pet. Br. at 35; Brief for the United States as Amicus Curiae Supporting Petitioners ("U.S. Br.") at 17 ("the proper focus . . . is on the commercial significance *to the defendant's business* of the noninfringing use in comparison to the infringing use") (emphasis in original).

The most obvious response to this argument is that not all products or software are commercial or commercially viable. Many socially beneficial and lawful products are not designed to earn revenue or make profits. For example, open source software products, such as Linux, a computer operating system that can be used as an alternative to Windows, are free to all users. Even many new technologies and products designed to be revenue-generating are not deemed to be commercially viable when they are first introduced. Under petitioners' novel theory of liability, the makers of any such products would nevertheless be liable for copyright infringement if their products could be used to commit infringement, regardless of whether the products also had legitimate and beneficial uses, or might in the future.

More importantly, under these tests, if 99% of Grokster's uses were noninfringing, but it derived all of its revenue from infringing uses, then Grokster would be held liable and shut down, suppressing the 99% of noninfringing uses. This result cannot be squared with *Sony*; in fact, it would turn *Sony* on its head, making a technology developer liable regardless of whether its product had substantial noninfringing uses. In addition, the obviously negative effect on free speech of such a test should preclude this Court from altering *Sony* to adopt it.

C. A Percentage-Based Test Would Lead To Harmful Results.

Petitioners' emphasis on the percentage of infringing uses is not only wrong as a matter of law, it would also lead to results that would harm free speech and the development of new technology. Considering the millions of files that are currently

being shared, *see supra* at 13, the noninfringing speech taking place on peer-to-peer networks cannot be dismissed lightly. Secondary infringement liability cannot ensue simply because the percentage of infringing use seems "too high." Regardless of whether a product is used as a means of infringement 90% of the time, 75% of the time, or 40% of the time, the Court must focus its attention on the value – not just the quantity – of the noninfringing uses of the product.

When assessing the value of a technology's noninfringing use, the Court should not only consider the value to the individuals who are actually exchanging files, but should also take into account the benefits that can accrue to the public at large as a result of the free flow of important information. For example, after the "blaster virus" spread through the Internet, paralyzing those relying on Microsoft operating systems, users of peer-to-peer technology were able to share files that were designed to repair the damage and protect other users from infection. *See Pornography, Technology and Process: Problems and Solutions on Peer-to-Peer Networks: Hearing Before the Senate Jud. Comm.*, 108th Cong. (Sept. 9, 2003) (Statement of Alan Morris), *available at* http://judiciary.senate.gov/testimony.cfm?id=902 &wit_id=2277 (last visited Feb.24, 2005). Peer-to-peer technology was likewise recently used to enable millions of individuals around the world to view amateur videos of the devastation caused by the December tsunami in the Indian Ocean, leading to an outpouring of charitable aid for the victims. *See* Kim, *supra*.

Petitioners' (and some of their *amici's*) argument that no speech would be lost (or that the First Amendment harms would be insignificant) because the noninfringing speech on peer-to-peer networks would still be available from other forms of communication is wrong both as a matter of law and fact. This Court has repeatedly held that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. State*, 308 U.S. 147, 163 (1939); *see also Spence* v. *Washington*, 418 U.S. 405, 411 n. 4 (1974) (*per curiam*) ("reject[ing] summarily" contention that law criminalizing exhibition of altered U.S. flag caused only "'minuscule and trifling'" infringements on speech rights because of existence of "'thousands of other means

available'" for expression). Indeed, this Court rejected that very proposition in connection with the Communications Decency Act ("CDA"), which also would have had the effect of restricting certain forms of Internet speech. *Reno v. ACLU*, 521 U.S. 844, 879-80 (1997). In holding the CDA to be an unconstitutional restriction on speech, the Court explicitly rejected the government's contention that the CDA's restriction on speech in numerous Internet modalities was permissible because the law allowed a "reasonable opportunity" for such speech to occur elsewhere on the World Wide Web. *Id.* Citing *Schneider*, the Court held that "[t]he Government's position is equivalent to arguing that a statute could ban leaflets on certain subjects as long as individuals are free to publish books." *Id.*

Petitioners' claim that all of the noninfringing speech can be obtained elsewhere is also factually inaccurate. As discussed earlier, because of bandwidth and storage costs, it can be prohibitively expensive for many individuals and even larger entities to disseminate large files, such as audio and video files, through a web-based system. The costs are becoming so prohibitive that many files, such as those made available by *amici*, may soon only be available through peer-to-peer systems such as Grokster. If this speech cannot be distributed through peer-to-peer networks (which eliminate those costs), many speakers will have no choice but to refrain from disseminating the speech, denying both the speakers the right to express themselves and potential viewers and listeners the right to receive such materials. Moreover, a significant portion of the noninfringing material made available by *amici* are older works in the public domain, such as silent films, which are no longer being published and are difficult for libraries and archives to acquire, preserve and store. Peer-to-peer technology offers a cost-efficient and practical solution to this problem to make these works free and universally available. The alternative is that these works which form an important part of our history will simply not be available to many people.[13]

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[13] A few of petitioners' *amici* suggest that in determining whether a multi-use technology has substantial noninfringing uses, the Court should assess the "efficiency" of the technology for such uses, focusing on whether the uses can be achieved through other means. *See, e.g.*, Brief of Professors Peter S. Menell, David Nimmer, *et al.*, As Amici Curiae In Support of Petitioners, at 27 n. 11. That argument should be rejected for the reasons just discussed. Such a rule

If this Court had adopted the approach advanced by petitioners in this case, not only would the Sony Betamax have been banned, but video cassette recorders, or CD burners, or DVD recorders could still be banned today if a plaintiff showed that these products are now used for infringing purposes by whatever the magic percentage is determined to be. If the percentage of infringing uses were to increase over time, a product or software could be legal when introduced and for its first year, but thereafter become illegal. No developer of a technology that has infringing uses would ever truly be safe from liability. Xerox could be held contributorily liable if a certain percent of its copiers were being used to violate copyright law, unless it modified its copiers accordingly. E-mail could be banned or attachments prohibited if copyright holders could show that X percentage of e-mails or email attachments are infringing. Microsoft Word could be banned if copyright holders could show that it is being used X percentage of the time to plagiarize. This is most certainly an outcome that this Court properly sought to avoid. The Court should adhere to its decision in *Sony*.

III. Software Developers Should Not Be Required to Modify Their Products to Facilitate Enforcement of Copyright by Plaintiffs.

After reviewing the record on summary judgment, the district court ruled on the basis of undisputed facts that Grokster had "no ability to supervise or control the file-sharing networks, or to restrict access to them." *Grokster*, 259 F. Supp. 2d at 1045; *see also id.* ("there is no admissible evidence before the Court indicating that Defendants have the ability to supervise and control the infringing conduct"). The district court specifically found that Grokster could not screen and block files, noting that "[w]hen users search for and initiate transfers of files using the Grokster client, they do so without any information being transmitted to or through any computers owned or controlled by Grokster." *Grokster*, 259 F. Supp. 2d at 1040; *see also id.* at 1041 (finding

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would also subject technology developers to inherent uncertainty and risk, as at the time of development, even they will not know how "efficient" their product will be at some future point in time.

that StreamCast also plays no role in the identification or transfer of files). The court thus found that, unlike the prior Napster program, which had the ability to "police those exchanges" because of the indexing of files on its central server and its user registration requirements, respondents did not have that power or ability. *Grokster*, 259 F. Supp. 2d at 1044-45.

The district court also found that respondents could not block users from using their software. Grokster does not currently use registration or any other method to control access. *Id.* at 1040 n.7. StreamCast does not even control the initial access of a user, because users from other peer-to-peer systems using the Gnutella network can access files available through StreamCast. *Id.* at 1041. Thus, while Napster could "exclude particular users from it," the court found that "[s]uch is not the case here." *Id.* at 1045.

Because Grokster does not have control over those individuals using its technology for improper purposes, the district court correctly concluded that under traditional concepts of secondary liability – both contributory and vicarious – respondents were not liable for copyright infringement. Although respondents certainly have knowledge that their products are used for infringing purposes, the lower courts were correct to find that secondary liability cannot be imposed unless respondents also have the ability to act upon such knowledge and can do something to stop the infringement once they are aware it is occurring. *See Grokster*, 259 F. Supp. 2d at 1039 (the "critical question is whether Grokster and StreamCast do anything, aside from distributing software, to actively facilitate – or whether they could do anything to stop – their users' infringing activity"). Thus, in the *Napster* case, the makers of Napster were secondarily liable because – unlike respondents here – they not only had notice of the infringing activity, but could have acted upon that specific information because their software gave them the ability to remove the infringing files from their central index and to prevent access by known infringers in the future. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1022 (9th Cir. 2001) ("The record supports the district court's finding that Napster has *actual* knowledge that *specific* infringing material is available using its system, *that it could block access* to the system by suppliers of the infringing material, and *that it failed to remove the material.*") (emphasis added); *see also Religious Tech. Ctr. v. Netcom On-*

Line Communication Servs., Inc., 907 F. Supp. 1361, 1375 (N.D. Cal. 1995) (finding secondary liability because the Internet bulletin board administrator had the ability to prevent distribution of an infringing message or to delete it from the bulletin board after it had been posted, noting that Netcom "does not completely relinquish control over how its system is used, unlike a landlord").

Although petitioners essentially concede that Grokster cannot currently exclude users, prohibit specific files or otherwise control its users, petitioners argue that Grokster should be required to re-design its software in order to create these "control" functions and to use those functions to police copyrights. Thus, petitioners argue that Grokster must implement and "adopt reasonably available measures to prevent the infringement." Pet. Br. at 44.[14] Alternatively, petitioners and some of their *amici* argue that Grokster's failure to adopt such technology (or its redesign of its software to eliminate technologies which petitioners assert could also have been modified to permit expulsion of users) is evidence that Grokster "encourages" or "assists" infringement. Pet. Br. at 26.[15]

These arguments, too, are contradicted by *Sony's* express holdings. *Sony* makes clear that a manufacturer has no duty to alter its technological design to prevent any possible misuse by third parties, so long as substantial noninfringing uses of its technology (as currently designed) exist. *Sony*, 464 U.S. at 494

[14] Several of petitioners' *amici*, including the United States, expressly reject this proposition. *See, e.g.*, U.S. Br. at 19 n.3.

[15] That failure is one of several factors that petitioners proffer to suggest that Grokster "encouraged" and "assisted" infringement. It would be unwise and impractical for a court to rely in any way on at least some of these factors. *Compare* Pet. Br. at 25-26 *with* Brief of the Business Software Alliance as Amicus Curiae at 11-17; Brief of the Digital Media Association, *et al.* as Amici Curiae at 18-20. For example, petitioners believe marketing strategies are relevant. Under that theory, the popular digital recording system, TiVo, which is essentially no more than a digital version of the Betamax, would be illegal. According to its web site: "TiVo automatically finds and digitally records up to 140 hours of programming you want – your favorite show, every Coppola movie, home improvement programs, Dora cartoons, whatever you choose ... TiVoToGo lets you transfer shows to your laptop or easily burn them to DVD." *What Is Tivo?*, *available at* www.tivo.com/1.0.asp. Indeed, some of the petitioners have in fact claimed that this new TiVo feature is unlawful. *See* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-193A1.pdf.

(Blackmun, J., dissenting) (arguing in favor of forced modification).

The argument that hardware and software designers should be held liable if they create a product that is capable of infringing uses is also unwise for two reasons. First, it would prevent a wide variety of products and would prevent technological innovation. With digitization, and the increased power of computers, most products that can now be used for copying could adopt measures to eliminate or at least make more difficult some types of copying. At the simplest level, paper copy machines could be restructured so that they would not permit books to be copied. DVD recorders could be prohibited from allowing more than one playback of any recorded material. Even the video cassette recorder at issue in *Sony*, which could have been modified then, could now be further modified to, for example, erase any material taped off of television after it is viewed once or after a specified time period.

As the *amicus* brief of the Business Software Alliance suggests, such a rule would require each new product developer to distort its design to accommodate petitioners' concerns, no matter how inefficient or awkward. *See* Brief of the Business Software Alliance as *Amicus Curiae* at 13-14. Given the interaction of various products, determining which product must adopt which protections presents an almost insurmountable task. *Id.*

Second, in view of the remedies already available to copyright holders today, a new rule requiring all product manufacturers to redesign their products is largely unnecessary. For example, some television networks now insert codes into their broadcasts that preclude or limit copying. *See* HBO, *FAQ*, *available at http://www.hbo.com/corpinfo/cgmsafaq.shtml#jump0* (last visited Feb. 25, 2005) (detailing HBO's copyright protection policy and procedures).[16] The FCC recently enacted a regulation requiring all new consumer products capable of receiving digital television signals, including digital video recorders, to contain software that helps prevent unauthorized copying and

[16] Some copyright owners are similarly choosing to incorporate anti-copying measures into their products. *See* Mike Snider, *Anti-Swap CD Hits the Racks*, USA Today, Sept. 23, 2003, at D6.

distribution.[17] 68 Fed. Reg. 67,559 (2003). Copyright owners also have the very real ability to prevent and discourage copyright infringement by – as they have done for years – suing those who are actually committing the direct infringement. The music industry has in fact utilized this exact tactic, filing thousands of lawsuits against individuals accused of illegally downloading music through peer-to-peer networks. Graham, *supra*. Those efforts have apparently been quite successful. *Id.; see also* Transcript of March 25, 2004 Online Chat with Cary Sherman, President of RIAA, The Daily Texan Online, *available at* http://www.dailytexanonline.com/news/2004/03/25/Focus/Transcript.Of.Qa.With.Riaa.President.Cary.Sherman-641217.shtml (last visited Feb. 25, 2005) ("We've seen a marked decline in illegal file-sharing, a marked increase in business at the legitimate online music services, and a spike in CD sales as well. Frankly, the [lawsuit] program has been more successful than most people would have predicted."). Even further protection is now being provided to copyright owners by the federal government, which recently commenced a major effort to stop peer-to-peer copyright infringement by bringing criminal prosecutions against those directly committing the infringement. *See* Press Release, Dept. of Justice, *First Criminal Defendants Plead Guilty In Peer-To-Peer Copyright Piracy Crackdown* (Jan. 18, 2005), *available at* http://www.usdoj.gov/opa/pr/2005/January/05_crm_022.htm (last visited Feb. 24, 2005) (discussing "Operation Digital Gridlock" program and indicating that DOJ had successfully obtained the first federal convictions for copyright infringement committed using peer-to-peer networks).

Petitioners make a great deal out of the district court's statement that Grokster may have specifically structured its technology so that it could not exercise control and thus avoid liability for the infringing activities of users of its software. *Grokster*, 259 F. Supp. 2d at 1046. Whether or not that is true, this Court should recognize the independent virtues of

[17] Some of these solutions might themselves present legal problems. For example, to the extent the government mandates a technology that precludes fair use, there may be constitutional or other problems. *See Eldred v. Ashcroft*, 537 U.S. 186, 219-20 (2003) (noting that "copyright law contains built-in First Amendment accommodations," such as fair use).

decentralization in the realm of electronic communication. As other commentators have noted with regard to the Internet, decentralization means that the public "no longer need[s] to rely on a few centralized sources for information." Winkler, 84 MINN. L. REV. at 1869. A requirement of mandatory centralization or control, coupled with ever expansive secondary infringement liability, would also result in dramatically increased and overly zealous censorship by companies that are far more interested in avoiding liability than preserving noninfringing speech. *See* Alfred C. Yen, *Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment*, 88 GEO. L.J. 1833, 1871 (2000).

Moreover, as detailed earlier, decentralization facilitates communication with citizens in countries whose governments actively oppose free speech as a matter of official policy. *See supra* at 14-15. Forcing software companies to incorporate methods to monitor users and choke points to control the flow of information will only make it easier for totalitarian governments to censor speech with which they disagree. Notwithstanding petitioners' insistence that all technology developers should be required to modify their products to maximize surveillance and control, this Court cannot ignore the fact that such a rule would come at the expense of the free speech and expression protected by our Constitution and international human rights norms. *See* International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 19, 999 U.N.T.S. 171.

The Court should similarly reject petitioners' contention that development of products specifically designed to preserve users' anonymity is a factor suggesting that the technology developer is actively encouraging (and should be liable for) copyright infringement. *See* Pet. Br. at 25. Anonymous speech is fully protected by the First Amendment. *See, e.g., Watchtower Bible & Tract Soc'y of New York, Inc. v. Village of Stratton*, 536 U.S. 150, 166 (2002) (noting that anonymous speech is part of "our national heritage and constitutional tradition"); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995) ("anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent"). Efforts to enable individuals to communicate anonymously should not, therefore, be

discouraged or, even worse, penalized as evidence of encouraging copyright infringement.

Because Grokster has no ability to exercise control over users of its software and no mechanism for removing infringing files, petitioners have no basis for holding Grokster secondarily liable for the actions of third parties. Moreover, in light of the virtues of decentralization in the electronic realm, the Court should not mandate that technology designers incorporate a particular level of surveillance and control over users of its products.

IV. Free Speech And The Public Interest Are Best Served By Rules That Allow New And Innovative Mediums Of Communication To Develop And Flourish.

Amici do not condone the violation of copyright law. Courts, however, should not allow the interests of individual copyright holders to eviscerate the crucial protections contained in the First Amendment. *See Harper & Row Publishers, Inc. v. Nation Enterps.*, 471 U.S. 539, 582 (1985) (observing that limitations on copyright are appropriate when necessary to "ensure[] consonance with our most important First Amendment values"). The First Amendment creates a strong presumption in favor of speech and against regulations that would operate as prior restraints on speech. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) ("Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."). Petitioners attempt to turn this presumption on its head by suggesting that the abuses committed by some users of file-sharing technology can justify cutting off all other users, including those engaging in valuable and constitutionally protected speech.

This Court has noted that electronic communication allows "any person with a phone line . . . [to] become a town crier with a voice that resonates farther than it could from any soapbox." *Reno v. ACLU*, 521 U.S. 844, 870 (1997). This is particularly true for peer-to-peer technology, which facilitates pure speech to a greater degree than virtually any other technology available today. Therefore, just as with the Internet, there is "no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium." *Id.* This Court should

acknowledge that the noninfringing communication taking place on these networks is entitled to full constitutional protection.

As explained above, peer-to-peer technology provides users with an easy and inexpensive way to communicate with each other. Particularly for libraries and other entities devoted to public education and the free flow of information, peer-to-peer technology provides the most cost-efficient and, in some cases, the only feasible alternative for accomplishing their mission. Likewise, there are many who use this technology for valid commercial reasons, such as product promotion and distribution, and market research. Whereas web-based publishers incur significant and increasingly prohibitive costs for bandwidth and storage, peer-to-peer systems allow the data to remain with individual members of the network, spreading out storage costs and dispersing web traffic throughout the network. In many ways, peer-to-peer technology serves the same purposes and provides the same benefits as system caching, a practice which Congress recognized as valuable and chose to accommodate in the DMCA.[18]

Petitioners are essentially asking this Court to shut down technology unless it conforms to specifications dictated by copyright holders. Although copyright law bestows significant rights upon copyright holders and is itself an important mechanism for promoting valuable speech, petitioners have no right to veto new technology simply because it may enable some to violate their rights. *See Sony*, 464 U.S. at 441 n.21 (rejecting claim that copyright owners have right to control distribution of products that can be used to infringe their copyrights). Such a rule would run fundamentally counter to the interests of the public, whose wellbeing depends on scientific advances and technological breakthroughs. It would also directly contradict the vital principle established by this Court that legitimate speech cannot be stifled in the name of stopping unlawful speech. *See, e.g., Butler v. State of Michigan*, 352 U.S. 380, 383 (1957) (invalidating ban on sale to adults of books deemed harmful to children on ground that, "Surely, this is to burn the house to roast the pig"); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002) ("The argument,

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[18] "System caching" is the process whereby a computer system automatically makes a temporary copy of material provided to it by a third party "for the purpose of making the material available to users of the system or network who . . . request access to the material from the [third party]." 17 U.S.C. § 512(b)(1).

in essence, is that protected speech may be banned as a means to ban unprotected speech. This analysis turns the First Amendment upside down."); *Reno*, 521 U.S. at 875 (statute prohibiting certain speech on Internet deemed unconstitutional because it would also suppress protected speech for adults). In other words, even if most of the speech occurring on peer-to-peer networks is unlawful, that speech cannot be suppressed through a mechanism that would also stifle the enormous amount of protected speech that is occurring as well. As the Court has repeatedly emphasized, "the separation of legitimate from illegitimate speech calls for more sensitive tools." *Speiser v. Randall*, 357 U.S. 513, 525 (1958).

As this Court made clear in *Sony*, so long as a technology is capable of substantial noninfringing uses, a court may not effectively ban the technology simply because some have chosen to abuse its capabilities. *Sony*, 464 U.S. at 442; *see also Napster*, 239 F.3d at 1021 ("To enjoin simply because a computer network allows for infringing use would, in our opinion, violate *Sony* and potentially restrict activity unrelated to infringing use."); *In re Aimster*, 334 F.3d at 649 ("The [Supreme] Court was unwilling to allow copyright holders to prevent infringement effectuated by means of a new technology at the price of possibly denying noninfringing consumers the benefit of the technology."). Peer-to-peer technology indisputably has numerous valuable noninfringing uses. Grokster is, accordingly, entitled to the protections of *Sony*. Petitioners' contributory and vicarious liability infringement claims against them were properly rejected.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals should be affirmed.

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